Supreme Court, U.S.
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No. 98-1497

IN THE

Supreme Court of the United States

GRAHAM C. FARIA,

Petitioner,

v.

TOWN OF PALM BEACH,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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App. — Appendix

Pet. — Petition for Writ of Certiorari

STATEMENT OF THE CASE

Petitioner is an insulin-dependent diabetic. He applied for employment as a police officer with the Town of Palm Beach, Florida ("Town") in February, 1994. At the time, Petitioner was employed by the Palm Beach County Sheriff's Office ("PBSO") as a corrections officer. Following a physical agility test, written test and personal interviews, Petitioner's name was placed on the eligibility list for employment. In July, 1994, Petitioner was informed of a conditional offer of acceptance and that he would be required to undergo a background investigation, psychological examination and a medical examination by the Town's physician. Following the conditional offer of acceptance, the Town conducted a background investigation and obtained records from Petitioner's employment with the PBSO indicating that Petitioner had experienced at least three disabling episodes of hypoglycemic shock or hypoglycemic attacks while on duty at the PBSO detention facility and during the time he attended the police academy.

The records from the PBSO indicate that Petitioner suffered a disabling hypoglycemic attack in a control room at the detention facility on February 7, 1994. Petitioner is described as incoherent, unresponsive, oblivious to his surroundings, swinging his arms wildly and glassy eyed. Petitioner locked himself in the control room and it took five minutes before other officers could gain access to the area. The report states that Petitioner had a similar incident in a control room approximately a year and a half before. Petitioner's supervisor reported that this was about the fourth or fifth time Petitioner has had one of these seizures. Moreover, the records from the PBSO reveal that Petitioner suffered a hypoglycemic attack in January 1992 while

attending the Police Academy. He is described as sweating, disoriented, unable to support himself and unable to stay awake unless prodded.

Petitioner contends that a reasonable accommodation to lessen the likelihood of these attacks is that he carry snacks, glucose tablets and a blood testing kit on his person. At the time of the hypoglycemic attack on February 7, 1994 Petitioner had a food bar available but it was not sufficient to raise his blood sugar level due to his flu symptoms and vomiting shortly before. Petitioner had no glucose tablets on his person. Similarly, Petitioner did not have food or glucose tablets on his person when he suffered the other disabling hypoglycemic attacks while on duty with the PBSO.

The Town's physician, Joseph Ojea, M.D., reviewed the PBSO reports prior to the Petitioner's pre-employment medical examination on September 29, 1994. Dr. Ojea discussed the reports with the Petitioner during the medical examination and Dr. Ojea concluded that the likelihood of hypoglycemic attacks constituted a significant risk to the health or safety of others that could not be adequately lessened by reasonable accommodation. The risk is that Petitioner is likely to suffer hypoglycemic attacks, confusional states and blackouts while on the road, while in emergency situations and in situations that require his full attention. Dr. Ojea concluded that the Petitioner suffers from a condition known as "hypoglycemic unawareness" where the attacks occur quickly and with little warning. Petitioner was notified by the Town's Personnel Director on October 5, 1994 that he would not be hired for the position of police officer.

The first paragraph in Petitioner's Statement of the Case purports to be "statements made by Dr. Ojea to the Petitioner during the pre-employment medical examination." In fact, it does not accurately quote Dr. Ojea. The language does not come from Dr. Ojea's deposition or even the Plaintiff's deposition but from Petitioner's self-serving affidavit that was filed in response to the Town's motion for summary judgment. In the affidavit, Petitioner contends that Dr. Ojea "misdiagnosed" him in terms of his pattern of "hypoglycemic unawareness." However, Petitioner offered no medical evidence to refute Dr. Ojea's expert testimony. Petitioner offered no medical evidence that his condition does not pose a significant risk to the health or safety of others. Petitioner offered no medical evidence as to whether a reasonable accommodation could lessen the likelihood or severity of his recurring hypoglycemic attacks.

It is noteworthy that the record before the district court contains evidence of at least eight documented disabling hypoglycemic attacks that occurred from June, 1992 to July, 1997 that were not known to the Town at the time of the employment decision. Petitioner experienced hypoglycemic attacks while on duty as a part-time police officer with the Oak Bluffs, Massachusetts Police Department where he worked from May, 1995 until August, 1997. One hypoglycemic attack occurred while Petitioner was directing traffic at a construction site and he was described as oblivious, sweating and weak. During several other hypoglycemic attacks that occurred after May, 1995, Petitioner is described as ranging from unresponsive and confused to combative. On several such occasions Petitioner had to be physically restrained and on one occasion he was so out of control that he sustained a laceration on his head and bit his tongue.

The district court granted summary judgment in favor of the Town on the grounds that "[n]o genuine issues of material fact exist with respect to whether . . . [the Petitioner] . . . is a qualified individual under the ADA". App. 13a. The district court notes that Petitioner offers no evidence contrary to the evidence that he is disoriented and can be combative and aggressive during these diabetic attacks. App. 12a.

Petitioner contends that the district court placed the burden on the Petitioner to prove a negative — that he would not present a direct threat if hired as a police officer. Pet. at 5. This statement is not only illogical but is a misstatement of the law. Because the essential job functions of a police officer reasonably implicates the safety of others, the district court determined that the Petitioner must demonstrate that he is "qualified" in that he can perform the job functions in a way that does not endanger others. No evidence was presented to the district court upon which a jury could reasonably find that the Petitioner's proposed accommodation would lessen the risk of hypoglycemic attacks. Conversely, the evidence was only susceptible to the conclusion that the Petitioner's proposed accommodation has repeatedly failed. *See* App. 12a.

On appeal the Eleventh Circuit Court of Appeal affirmed *per curiam* even considering only the facts known to the Town at the time of the employment decision and disregarding the evidence of the eight other documented hypoglycemic attacks.

REASONS FOR DENYING THE WRIT

I.

THE DISTRICT COURT'S DECISION GRANTING SUMMARY JUDGMENT IS SUSTAINABLE REGARDLESS OF WHETHER THE BURDEN TO PROVE A DIRECT THREAT OF HARM RESTS WITH THE PLAINTIFF OR DEFENDANT.

The district court's decision granting summary judgment is sustainable no matter who had the burden of proof. The record before the district court indicates that the Petitioner had ten documented hypoglycemic attacks in the last six years and many more were alleged. App. 12a. The district court notes that the Petitioner was both disoriented and combative during these hypoglycemic attacks and the Petitioner offered no contrary evidence that he was not disoriented, combative and aggressive. App. 12a.

Petitioner's only contrary response to the overwhelming evidence of direct threat is his affidavit stating that no one was injured as a result of his hypoglycemic attacks. However, the district court judge notes that Petitioner cut his head and bit his tongue during one of his hypoglycemic attacks. App. 12a. Moreover, the Petitioner's claim that no one has been hurt in the past is not "significant" evidence that no one will be injured in the future. App. 12a. Persons with diabetes have been lawfully excluded from employment because of the *potential* impact upon the public safety despite the fact that there has not been any actual injury. (emphasis provided). *See E.G. Daugherty v. City of El Paso*, 56 F.3d 695, 698 (5th Cir. 1995), *cert. denied*, 516 U.S. 1172 (1996) (insulin-dependent diabetic bus driver

is not "otherwise qualified" because of substantial risk that he could injure himself or others); *Amariglio v. National Railroad Passenger Corp.*, 941 F. Supp. 173, 179 (D. Ct. 1996) (passenger train attendant with poorly controlled diabetes cannot perform essential functions of the position without creating substantial risk of harm to passengers); *Myers v. Hose*, 50 F.3d 278, 282 (4th Cir. 1995) (bus driver with poorly controlled diabetes would profoundly compromise the safety of passengers, pedestrians, and other motorists and is, therefore, unable to perform essential job duties).

The district court's decision granting summary judgment notes that the Petitioner's hypoglycemic attacks continued to occur even though his previous employers allowed him the accommodation of carrying snacks, glucose tablets and a blood testing kit. App. 13a. The record before the district court is susceptible only to the conclusion that petitioner represents a direct threat to the health or safety of others in the workplace and that his proposed reasonable accommodation has repeatedly failed. App. 12a-13a.

Sup. Ct. R. 10 provides that a petition for a writ of certiorari will be granted only for "compelling reasons". Because the district court's decision granting summary judgment is sustainable no matter whether plaintiff or defendant had the burden of proof, the petitioner seeks what is, in effect, review in the abstract. Even if the suggested conflict as to which party bears the burden of proof was resolved in the abstract, the summary judgment in this case would still be affirmed. There is no "compelling reason" to grant the Petition for Writ of Certiorari in this case.

II.

THERE IS NO CONFLICT BETWEEN THE DECISION OF THE ELEVENTH CIRCUIT IN THIS CASE AND OTHER CIRCUIT COURTS ON WHETHER THE BURDEN TO PROVE A DIRECT THREAT RESTS WITH THE PLAINTIFF OR DEFENDANT.

The Petitioner urges the Court to grant review in this case "to resolve the conflict among the circuit courts on whether the burden to prove a direct threat rests with the plaintiff or defendant." Pet. at 6. However, the review sought in this case is from a decision of the Eleventh Circuit Court of Appeals, which, *per curiam*, affirmed a summary judgment. App. 1a. There is nothing on the face of the decision in this case from which it can be said that it conflicts with decisions of the Fifth and Eighth Circuit Courts of Appeal that are cited by the Petitioner. Pet. at 7.

III.

THERE IS NO SQUARELY PRESENTED CONFLICT AMONG THE CIRCUIT COURTS ON WHETHER THE BURDEN TO PROVE A DIRECT THREAT OF HARM RESTS WITH THE PLAINTIFF OR DEFENDANT.

The Petitioner argues that the Eleventh and First Circuit Courts of Appeal have squarely held that it is the plaintiff's burden to prove that the employee or job applicant does not pose a direct threat of harm and that the Fifth and Eighth Circuit Courts of Appeal have squarely held that it is the defendant's burden. The petitioner's argument misstates the law in the Fifth and Eighth Circuits.

Petitioner cites the decision of *Rizzo v. Children's World Learning Centers*, 84 F.3d 758 (5th Cir. 1996) ("*Rizzo I*") as holding that the direct threat issue is an affirmative defense on which the employer bears the burden of proof. In *Rizzo I* the Fifth Circuit reversed a summary judgment in favor of the employer and remanded the case for jury trial. However, following judgment on jury verdict, the case was again appealed to the Fifth Circuit and a second decision was recently rendered in *Rizzo v. Children's World Learning Centers*, __ F.3d __ 1999 WL 219009 (5th Cir. (Tex.), Apr. 15, 1999) ("*Rizzo II*"). In *Rizzo II* the Fifth Circuit states that a thorough reading of the caselaw and the regulations reveal that there is "no conflict at all" between the Fifth and the Eleventh Circuits.

> We, therefore, agree with the Eleventh Circuit that the burden of proof is on the plaintiff to prove that, as a qualified individual, she is not a direct threat to herself or to others.

1999 WL 219009, *3.

The Fifth Circuit goes on to state that when an employer imposes a safety requirement that screens out or tends to screen out a class of individuals with disabilities, the burden of proof shifts to the employer to prove that the employee is, in fact, a direct threat to the health or safety of herself or others. 1999 WL 219009, *3. The burden of proof is on the defendant only in cases concerning "safety requirements that tend to screen out an individual with a disability or a class of individuals with disabilities." 1999 WL 219009, *3. Otherwise, the plaintiff has the burden of proving that he or she can perform the essential functions of the job that the plaintiff holds or desires and that the plaintiff does not

pose a direct threat to the health or safety of self or others. 1999 WL 219009, *6. In short, the Fifth Circuit is in agreement with the Eleventh Circuit in holding that the qualification standard includes the requirement that an individual not pose a direct threat to the health or safety of others in the workplace. *See* 42 U.S.C. § 12113(b).

Petitioner concedes that the direct threat issue was not presented in *Benson v. Northwest Airlines, Inc.*, 62 F.3d 1108 (8th Cir. 1995). *Benson* simply discusses the three-step method for allocating burdens of persuasion and production in an ADA case. An ADA plaintiff has the initial burden of making out a prima facie case of discrimination and that reasonable accommodation is possible. Once a prima facie case is made out, the second step occurs and the burden of production shifts to the employer to show that it is unable to reasonably accommodate the employee. 62 F.2d at 1112. If the employer offers evidence that the employee cannot perform the essential functions of the job even with reasonably accommodation, the burden shifts back to the employee to prove that the employer's proffered reason is a pretext for discrimination. The plaintiff's burden to prove pretext merges with his ultimate burden of persuasion. 62 F.2d at 1112; *see St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742, 2752 (1993) (ultimate burden of persuading trier of fact that defendant intentionally discriminated against plaintiff remains at all times with plaintiff). The general discussion of the burdens of persuasion and production in *Benson* does not specifically deal with the issue of direct threat and, therefore, it cannot be said that *Benson* presents a conflict with the Eleventh Circuit or the First Circuit on a "same important matter". *See* Sup. Ct. R. 10(a).

Petitioner correctly notes that the burden of proof on the issue of direct threat was not squarely presented in the Seventh Circuit decision of *E.E.O.C. v. AIC Security Investigations, Ltd.*, 55 F.3d 1276 (7th Cir. 1995). There, the court of appeal reviewed jury instructions that required the jury to consider whether the plaintiff posed a danger to workplace safety in the performance of an essential function of his job. 55 F.3d at 1284.

The most definitive analysis of the direct threat provisions of 42 U.S.C. §§ 12113(b) and 12111(3) is found in *EEOC v. Amego*, 110 F.3d 135 (1st Cir. 1997). The First Circuit examined the legislative history of the ADA as well as the Rehabilitation Act of 1993 ("Rehabilitation Act") with respect to this issue. Under § 504 of the Rehabilitation Act, the question of whether a plaintiff poses a risk to the health or safety of others is analyzed in the context of whether the plaintiff is "otherwise qualified". The qualification analysis under the Rehabilitation Act is an issue for which the plaintiff bears the burden of proof. *See School Board of Nassau County v. Arline*, 480 U.S. 273, 287-88, 106 S. Ct. 1123, 1130-31 (1987).

The ADA expressly provides that qualification standards *may* include a requirement that an individual not pose a direct threat to the health or safety of other individuals in the workplace. 42 U.S.C. § 12113(b) (emphasis provided). Where the essential job functions *necessarily* implicate the safety of others, a plaintiff must demonstrate that he can perform those functions in a way that does not endanger others. *Amego*, 110 F.3d at 114. (emphasis provided). The essential job functions of a police officer necessarily implicates the safety of others and an applicant has the burden to prove that he poses no risk of harm to others. Otherwise, the anomalous result is that there would

be a lesser burden of proving the qualifications for a plaintiff where the job involves the care and safety of others than when the job does not involve a safety risk to others. *See Amego*, 110 F.3d at 144. It is inconceivable that Congress intended to weaken the burden on plaintiffs to prove that they are qualified where the essential job functions implicate the safety of others. *Id.*, at 144. The Eleventh Circuit similarly holds that the ADA "qualification standard" includes the requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace. *Moses v. American Nonwovens, Inc.*, 97 F.3d 446, 447 (11th Cir. 1996).

While there is some language in the Fifth Circuit and Eighth Circuit decisions cited by the petitioner which may at first blush appear to present a conflict with the Eleventh Circuit and First Circuit decisions, it cannot be said that a conflict is squarely presented. In light of *Rizzo II*, there is the clear expression from the Fifth Circuit that there is, in fact, no conflict. In any event, certiorari may be properly denied so to defer an issue until it can have the benefit of consideration by several lower courts, or until culminating events provide a better perspective for decision. Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction 2D § 4004.1* (1996). Any possible conflict between the circuits as to which party bears the burden under the ADA to prove direct threat has not fully developed, if it can be said that there is any conflict at all. It is preferable to allow further analysis by lower courts in order to more fully develop and crystallize the issue.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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